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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CARLOS CIFUENTES, Plaintiff and Appellant, v. COSTCO WHOLESALE CORPORATION et al., Defendants and Respondents.	2d Civil No. B231684 (Super. Ct. No. 1338554) (Santa Barbara County)

Carlos Cifuentes sipped three ounces of a beverage sold by Costco, his employer. A fellow employee observed the act and immediately reported it to Costco management. Cifuentes was terminated for violating the employer's "grazing policy." He sued his employer, the fellow employee, and two managers alleging contract and tort claims. All the claims are based on the contention that his termination was in retaliation for an earlier report Cifuentes had made to Costco that the fellow employee had violated company policy by hugging another employee. The trial court granted summary adjudication to all defendants on the tort claims and denied summary adjudication on the contract claims. A jury awarded him $301,378 for breach of contract.

Cifuentes appeals from that portion of the final judgment granting defendants summary adjudication on the tort claims. He asserts he has provided evidence which would support a reasonable inference that his termination was retaliatory. We affirm.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Appellant Carlos Cifuentes was a part-time employee who worked in the food court at respondent Costco Wholesale Corporation's store in Goleta. When he was hired in 2004, Cifuentes was given an employee agreement (Agreement) to read and sign. The Agreement stated that he would be terminated only for good cause. It contained a section entitled "Causes for Termination." One cause for termination was "Proof or confession of dishonesty including, but not limited to: [¶] a. Grazing." A footnote defines "grazing" to include "Food Court and fresh food products and any ingredients used in their preparation."

Cifuentes also was given a separate document to read and sign entitled "Grazing." It states, "Any employee observed eating merchandise belonging to Costco Wholesale without paying for it beforehand is subject to disciplinary action per page 67 (item # 15a) of the March 2004 Employee Agreement. To help clarify, please note: [repetition of footnote 32 in Agreement]." The document also states: "Thank you in advance for your attention to this important policy." The document concludes with a section entitled, "To Be Completed By Employee." It states: "I have read the above policy concerning grazing and understand its intent and meaning. I understand that any violation of this policy can result in my immediate termination per page 67, item 15a of the March 2004 Employee Agreement." Both the Agreement and grazing policy were signed by Cifuentes.[1]

In September 2008, Cifuentes reported to one of his supervisors, Jose Arredondo, that he had seen front end manager, respondent Tom Current, hugging a

[1] Cifuentes signed a revised Agreement in 2007. No revisions were made to provisions in the Agreement that are relevant to this appeal.

female employee outside the store.[2] Arredondo reported the incident to Cifuentes's direct supervisor, Food Court Manager Julie Ledbetter. Ledbetter reported the incident to Assistant Warehouse Manager John Swangler. Swangler and Administrative Manager Roman Aguilar met with Cifuentes. Cifuentes told them what he observed. Swangler and Aguilar thanked Cifuentes and told him he would not get in trouble for making the report.

Swangler spoke to Current. Current admitted he hugged a female employee. Swangler advised Current that he had a duty to act appropriately toward employees. Swangler did not make a written report of the incident. He did not tell Current that Cifuentes had reported the incident. In his deposition, Cifuentes stated that he had no knowledge whether any employee had told Current that Cifuentes made a report concerning him. Except for Cifuentes's deposition testimony that Current would not speak to him, followed him around, and gave him weird looks, there is no other evidence that Current knew that Cifuentes had reported the incident.

Approximately six months later, on April 7, 2009, Current was checking the food court area for cleanliness, a regular part of his job duties. Current saw Cifuentes fill a three-ounce water cup with ice and Coke from the food court soda machine. Current said he saw Cifuentes walk around the corner from the soda machine, pass two trash bins, drink some of the soda, and place the cup on a ledge next to a large trash cart.

Current, who had not observed a grazing incident previously, reported his observations to respondent, Assistant Warehouse Manager Ronald DeBrum, the highest ranking manager on duty at the time. The conversation took place between 6:00-7:00 p.m. at the front of the store near the check stands. DeBrum determined that he wanted to speak to Cifuentes to hear his side of the story and instructed Current to bring Cifuentes to his office for a meeting. Current was present when Cifuentes met with DeBrum.

[2] Cifuentes initially reported that he had seen Current "hugging and kissing" the female employee. However, he admitted in his deposition testimony that he did not actually observe Current kissing her.

Cifuentes admitted that he poured ice and Coke into a three-ounce water cup. He stated he did so only after a customer complained that the Coke was flat. He believed that the procedure he followed in testing the soda was in compliance with store policy. According to Cifuentes, Current and DeBrum told him that they did not believe he was being honest and thought he was "stealing soda." At the end of the meeting, Cifuentes was told that the incident would be reported to respondent, Warehouse Manager Jim Blount.

In separate written statements to Blount, Current and DeBrum reported that Cifuentes could not identify or describe the customer who had made the complaint. They further reported that Cifuentes could not explain why he had not followed the correct procedure of putting a small amount of soda in a cup, tasting it, and pouring out the rest; why he put ice in the soda; why he went around the corner to drink the soda; or why he placed the cup on a ledge by the trash cart rather than throwing it away.

Blount met with Cifuentes on April 10. With DeBrum present, Blount asked Cifuentes for his version of the incident. Blount cautioned Cifuentes to be completely honest and accurate. Although Cifuentes had told DeBrum and Current that he was testing the soda in response to a customer complaint, Cifuentes told Blount that another food court employee told him the soda machine was not working. Cifuentes could not identify the employee. Blount responded that he would talk to all of the employees who were working the night of the incident, but he did not expect that any of them would say they had received a customer complaint about the soda. Cifuentes then admitted that he drank the soda and said, "I am guilty;" "I'm sorry, you're right;" "I tried to save my job;" and "[t]hat's the reason why I'm lying."

After meeting with Cifuentes, DeBrum prepared a counseling notice suspending Cifuentes for three days pending investigation of the incident. The counseling notice stated that the reason for Cifuentes's suspension was "Page 69 11.3 # B [referring to Employee Agreement] Falsification of company records and/or timecards, including omitting facts or willfully giving wrong or misleading information. This

includes, but is not limited to: B internal investigation. Page 69 #15 Proof or confession of dishonesty including, but not limited to: a. Grazing."

Blount informed Los Angeles Region Vice President of Operations, Frank Farcone, of Current's report and Cifuentes's version of the incident. Blount reported to Farcone rather than to Sean Parks, the vice president of the region which included Goleta, because Parks was on vacation at the time. Blount did not make any recommendation to Farcone concerning termination. After Farcone discussed the matter with Blount, he made the decision to terminate Cifuentes's employment on April 13. On that day, Cifuentes called Mario Padillo, Costco personnel specialist, and complained about unfair treatment.

Cifuentes filed a complaint alleging wrongful termination, negligence, breach of contract and breach of the covenant of good faith and fair dealing against Costco; and defamation, intentional infliction of emotional distress and negligence against Costco, Blount, DeBrum, and Current. He sought compensatory and punitive damages.

Respondents filed a motion for summary judgment/summary adjudication. After extensive briefing, the trial court granted summary adjudication to respondents on the tort causes of action and denied summary adjudication on the contract causes of action. A dismissal was entered in favor of Blount, DeBrum, and Current at the pretrial conference, as all causes of action against them individually had been summarily adjudicated in their favor. Cifuentes proceeded to trial on his contract claims against Costco and obtained a jury verdict in the amount of $301,378.

On appeal, Cifuentes asserts the trial court erred in granting summary adjudication on the tort claims because material issues of fact exist as to whether Cifuentes's termination was in retaliation for his report of the Current incident. Respondents assert that the trial court correctly granted summary adjudication on the tort claims because, as a matter of law, Cifuentes failed to establish required elements of the torts alleged.

DISCUSSION

Standard of Review

"The grant and denial of summary judgment or summary adjudication motions are subject to de novo review." (*Nakamura v. Superior Court* (2000) 83 Cal.App.4th 825, 832.) "[I]n moving for summary judgment, a 'defendant [meets]' his 'burden of showing that a cause of action has no merit if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant [meets] that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) "We must presume the judgment is correct, and the appellant bears the burden of demonstrating error." (*Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1376.)

RETALIATORY DISCHARGE

"When a plaintiff alleges retaliatory employment termination [such] as a claim . . . for wrongful employment termination in violation of public policy, and the defendant seeks summary judgment, California follows the burden shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, to determine whether there are triable issues of fact for resolution by a jury. . . . In the first stage, the 'plaintiff must show (1) he or she engaged in a "protected" activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action.' [Citation.]" (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108-1109.)

If the employee successfully establishes these elements, "the burden shifts to the employer to provide evidence that there was a legitimate, nonretaliatory reason for the adverse employment action. [Citation.]" (*Loggins v. Kaiser Permanente Internat.,*

supra, 151 Cal.App.4th at p. 1109.) If such a legitimate reason is shown, "the burden shifts back to the employee to provide 'substantial responsive evidence' that the employer's proffered reasons were untrue or pretextual. [Citation.]" (*Ibid.)*

Cifuentes established the first two elements. He reported he saw Current hug a female employee, arguably a violation of Costco's sexual harassment policy (see fn. 3, *infra*), and he was terminated six months later. Reporting incidents of sexual harassment is activity protected by the Federal Employment and Housing Act, Government Code section 12940, subd. (h).)[3] Costco also has an express policy prohibiting sexual harassment and requiring employees to report such incidents.[4]

CAUSATION

A plaintiff cannot merely show that he engaged in protected activity that was followed at some point by his termination. He must also "demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment." (*Turner v. Anheuser-Busch, Inc., supra,* 7 Cal.4th at p. 1258.)

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[3] A wrongful termination against public policy claim must allege specifically a statute or regulation containing a public policy. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1257; see also *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 84 [plaintiff has burden to provide the specific statutes and regulations on which the claim is based].) Cifuentes has not identified any such statute or regulation. For purposes of this appeal, we will presume that Cifuentes's report of Current's conduct was protected activity.

[4] Costco's policy is contained in section 2.5 of the Agreement, as follows: "If at any time you believe you are being subjected to harassment, . . . or . . . if you become aware of such conduct being directed at someone else . . . you are required to report the matter to a Manager. . . . All reported incidents will be investigated under the following guidelines:

"All complaints will be kept confidential to the fullest extent possible, and will only be disclosed as necessary to allow us to investigate and respond to the complaint. No one will be involved in the investigation or response except those with a need to know. All employees who participate in investigations are held to the same standards of confidentiality.

". . . . . .

"We will not permit retaliation against anyone who, in good faith, makes a complaint, assists another to complain, or cooperates in an investigation. If you feel you are being subjected to retaliation, report the matter to a Manager.

"**Again, you are required to report all incidents of harassment, discrimination, or other inappropriate behavior as soon as possible.**"

To establish a triable issue as to causation, Cifuentes relies on the following: (1) He reported an act of sexual harassment by Current; (2) after Cifuentes reported Current's conduct, Current would not talk to him, followed him around, and gave him "weird" looks; (3) six months later, Current reported that Cifuentes was stealing soda; (4) Blount and DeBrum knew that Cifuentes previously had made a report concerning Current; (5) Current himself had tested soda in the same manner as Cifuentes; and (6) Cifuentes made a formal complaint to Mario Padilla, Costco Personnel Specialist, that Current would not talk to him and gave him "weird" looks. Cifuentes asserts that these facts give rise to an inference that his termination was in retaliation for his report of Current's conduct.

A claim may be supported by an inference. However, an "'. . . inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork. [Citation.] Thus, an inference cannot stand if it is unreasonable when viewed in light of the whole record. [Citation.] . . .'" (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 389-390; see also *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807 [evidence must be substantial, not speculative, to demonstrate a triable dispute of fact]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119-1120 [unsupported conclusions must be disregarded].)

On appeal, Cifuentes relies on *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, to support his claim that he has presented sufficient evidence of causation to avoid summary judgment. In *Reeves*, the court used the so-called "cat's paw" principle to conclude that an employer was not entitled to summary judgment because the employee had provided sufficient evidence of retaliatory animus. This principle applies where a supervisor acts based on animus, but someone else makes the ultimate decision adverse to the employee. (*Id.* at p. 114.) "Imputation of retaliatory animus will be justified by any set of facts that would permit a jury to find that an

intermediary, for whatever reasons, simply carried out the will of the actuator, rather than breaking the chain of causation by taking a truly independent action." (*Id.* at pp. 114-115, fn. 14.) Under the cat's paw principle the discriminatory animus of a supervisory employee may be imputed to the ultimate decision maker and thus to the employer if the decision maker is merely the tool by which the supervisor carries out his or her discriminatory purpose. (*Id.* at pp. 113-114.) The cats paw principle applies when the decision maker is the mere rubber stamp or unwitting conduit through which the supervisor carries out his or her discriminatory purpose. (*Id.* pp. 113-115.)

The evidence Cifuentes relies on is insufficient to raise a triable issue of material fact as to causation under the cats paw theory or any other legal principle. Cifuentes contends that Current reported the soda incident to retaliate against Cifuentes for his earlier report of Current's misconduct. The only evidence he offers to establish a nexus between the two incidents is that Current did not talk to him, followed him around and gave him "weird" looks. We do not share Cifuentes's view that the asserted ambiguous conduct, even if it occurred, shows Current harbored retaliatory animus against Cifuentes.

Even were we to assume that the evidence establishes such intent, we would reject Cifuentes's cat's paw argument because Current was not Cifuentes's supervisor. In reporting the soda incident, Current was merely a co-employee reporting conduct he believed to constitute grazing, as he was required to do by store policy. (See *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70 [statements by individuals not integrally involved in decisions culminating in termination of plaintiff's employment not attributable to employer].)

Cifuentes's assertion that Farcone's decision to terminate him was somehow influenced by Current also is based on speculation. Cifuentes admitted he did not know if Farcone was aware that he had reported Current for misconduct. Farcone testified he had not spoken to Current and had no knowledge that Cifuentes had reported Current for sexual harassment prior to making the decision to terminate Cifuentes. There is no evidence from which a reasonable inference can be drawn that Current influenced the

decision to terminate Cifuentes. (See *Horn v. Cushman & Wakefield Western, Inc.*, *supra,* 72 Cal.App.4th at p. 817 [plaintiff """must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses"""]; see also *Lindahl v. Air France* (9th Cir. 1991) 930 F.2d 1434, 1437-1438 ["plaintiff cannot carry this burden simply by restating the prima facie case and expressing an intent to challenge the credibility of the employer's witnesses on cross-examination. She must produce specific facts either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible"].)

REASONS FOR TERMINATION

Costco carried its burden of showing that it had a legitimate, nondiscriminatory reason for terminating Cifuentes. The Agreement and separate grazing policy Cifuentes signed demonstrates that Costco views grazing as serious misconduct. Both Farcone and Parks testified at their depositions that grazing was cause for immediate termination and that each of them had summarily terminated numerous employees for grazing without considering the employee's performance record or other factors.

PRETEXT

Where, as here, the employer provides a legitimate, nondiscriminatory reason for discharge, the burden is on the employee to demonstrate that the justification was merely a pretext to cover up the employer's unlawful discriminatory intent. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) To avoid summary judgment where an employer has provided a legitimate, nondiscriminatory reason for an employment decision, "[i]t is not enough for the employee simply to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.)

In addition to the evidence proffered in support of his causation argument, Cifuentes asserts he has shown a triable issue of fact as to pretext because (1) Costco's grazing policy does not expressly include drinking soda; (2) the Agreement does not state

that grazing would result in mandatory termination; (3) Current knew that food court employees are permitted to taste soda in response to a customer complaint; (4) Blount failed to independently investigate whether Cifuentes's conduct constituted grazing; (5) no employee in the Costco Goleta store had ever been terminated for soda grazing; (6) other employees were not terminated for allegedly more egregious conduct, such as coming up short in their cash drawers; (7) Cifuentes's performance reviews were "outstanding;" and (8) the jury trial of his contract claims resulted in a special verdict finding that Costco did not have good and sufficient cause to terminate Cifuentes. This litany is insufficient to raise a triable issue as to pretext.

Cifuentes's assertion that he was not informed that he could be terminated for grazing is belied by express provisions in the Agreement. It contains a section entitled "Standards of Conduct and Discipline," stating:

"11.1 STANDARDS OF CONDUCT AND DISCIPLINE

"The following basic Company guidelines are not intended to encompass all Company policies and procedures. If you have questions, please ask your Supervisor for clarification. We may, from time to time, modify these guidelines at our discretion.

"11.2 CAUSES FOR TERMINATION

"The following is a list of actions that can *result in immediate termination* of employment. No previous Counseling Notices are necessary. If termination does not occur, an Employee Counseling Notice will be issued and is permanently retained in the employee's personnel file.

"1. Falsification of Company records and/or timecards, including omitting facts or willfully giving wrong or misleading information. This includes, but is not limited to:

". . . . . .

"b. internal investigations

". . . . . .

"15. Proof or confession of dishonesty including, but not limited to:

"a. grazing." (Italics added.)

The separate grazing policy that Cifuentes signed also contains language that any reasonable employee would interpret to mean that termination for violating the policy was likely: "I have read the above policy concerning grazing and understand its intent and meaning. I understand that any violation of this policy can *result in my immediate termination* per page 67, item 15a of the March 2004 Employee Agreement." (Italics added.)

Cifuentes's assertion that investigation of the soda incident was conducted in an unfair manner is unsupported by the record. Current reported the soda incident to the highest ranking manager on duty at the time. DeBrum and Current then met with Cifuentes to hear his side of the story. At the end of the meeting, Cifuentes was told that the incident would be reported to Warehouse Manager Blount.

Current and DeBrum made written statements to Blount stating that Cifuentes denied that his conduct constituted grazing. Contrary to Cifuentes's assertion that Blount did not conduct an independent investigation, he and DeBrum met with Cifuentes on April 10. At that meeting, Cifuentes first denied that he was grazing but, upon further questioning, admitted that he was guilty. After the meeting, DeBrum prepared a counseling notice suspending Cifuentes for three days without pay pending investigation of the incident. The counseling notice informed Cifuentes that he was charged with violating those sections of the Agreement prohibiting grazing, giving wrong or misleading information during an investigation and lying during the investigation. Only after Cifuentes had two opportunities to explain his actions did Blount speak to Farcone, who then made the decision to terminate Cifuentes. These procedures gave Cifuentes an ample opportunity to explain his conduct.

Moreover, assertions of unfair investigation practices are insufficient to show retaliatory animus, where, as here, no substantial evidence of retaliatory animus is contained in the record. (See, e.g., *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 821 [reasonable attempts to investigate employee theft, including interrogations, are considered normal part of the employment relationship and do not give rise to a tort action against the employer].)

The assertions that no employee at the Goleta Costco store had ever been terminated for grazing and that his good performance record should have prevented his termination are of little significance because undisputed evidence in the record shows that the grazing policy is strictly enforced and is grounds for immediate, mandatory termination. Both Farcone and Parks had terminated numerous employees at other Costco stores for grazing without regard to an employee's performance evaluations. Cifuentes's contention that other employees who engaged in misconduct other than grazing were not terminated fails for the reasons stated above--violation of the grazing policy was considered by Costco to be a cause for immediate termination.

The findings of the jury which decided the contract causes of action are not a proper consideration in our review of summary adjudication of tort claims. (*Jacobs v. Retail Clerks Union, Local 1222* (1975) 49 Cal.App.3d 959, 966.)

Cifuentes's opposition papers fail to satisfy his burden of presenting substantial responsive evidence that his employer's reason for termination was untrue or pretextual.

DEFAMATION

Cifuentes alleges that statements made by Current, DeBrum and Blount during the course of the investigation, specifically that he was "stealing soda" and "[lying] about it," were defamatory. We disagree.

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.)

Summary judgment is favored in defamation cases due to the chilling effect of protracted litigation on rights protected by the First Amendment. Courts impose more stringent burdens on a plaintiff who opposes the motion and require a showing of high probability that the plaintiff will ultimately prevail in the case. In the absence of such showing, courts are inclined to grant the motion, and do not permit the case to proceed beyond the summary judgment stage. (*Alszeh v. Home Box Office* (1998) 67 Cal.App.4th 1456, 1460.)

The trial court granted summary adjudication in part because it found the qualified privilege of Civil Code section 47, subdivision (c), applied. That section provides that a privileged communication is one made "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

The Civil Code section 47, subdivision (c) privilege applies when "the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest." (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846.) An employer's economic interest in clarifying and preventing abuses of its policies and promoting employee morale justifies limited publication of the reasons for an employee's termination to other employees. (*Id.*, at p. 849.) An employer is not liable for defamation if one employee advises another employee of a suspicion that a coworker has engaged in wrongdoing, so long as the communication is not motivated by malice. (*Kelly* v. *General Telephone Co.* (1982) 136 Cal.App.3d 278, 286.) Communications made in a commercial setting relating to the conduct of an employee fall within the common interest privilege. (*Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 995; see also *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 440 ["because an employer and its employees have a common interest in protecting the workplace from abuse, an employer's statements to employees regarding the reasons for termination of another employee generally are privileged"].)

The statements made by Current, DeBrum and Blount fall within the privilege because they concerned the reasons for Cifuentes's termination and were made to others working at Costco. Consequently, Cifuentes bore the burden of proving that the statements were made with malice. (*Lundquist* v. *Reusser* (1994) 7 Cal.4th 1193, 1202-1203.) Malice is ""a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person."' [Citations.]" (*Id*. at p. 1204.)

To defeat summary judgment, Cifuentes was required to produce clear and convincing evidence of actual malice. In *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413, our Supreme Court explained: "'The malice necessary to defeat a qualified privilege is "actual malice" which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights [citations].'" "[M]alice is not inferred from the communication." (Civ. Code, § 48; see *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 752-753 ["'[I]f the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege'"]; see also *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 932 [bare assertion that the statements made are false does not make them so, much less establish that they were made maliciously].)

Cifuentes argues he has raised a triable issue of material fact as to malice because Current and DeBrum talked about the grazing incident near a check stand where others could possibly have heard the conversation. There is no evidence that store customers overheard the conversation between DeBrum and Current. Both of them stated that when they spoke, no customers were in the vicinity. The alleged defamatory statements were privileged. Cifuentes has failed to meet his burden to show actual malice.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Cifuentes alleges the individual respondents engaged in "outrageous" conduct that was intended to, and did, cause plaintiff "severe emotional distress," giving rise to common law causes of action for intentional infliction of emotional distress.

The trial court did not err in granting summary adjudication of this claim because workers' compensation is the exclusive remedy for injuries arising out of termination of employment. As stated by our Supreme Court in *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902: *"Shoemaker v. Myers* is of particular relevance here because it involved termination of a whistleblower employee. We said: 'To the extent plaintiff purports to allege any distinct cause of action, not dependent upon the violation of an express statute or violation of fundamental public policy, but rather directed at the *intentional, malicious* aspects of defendants' conduct . . . , then plaintiff has alleged no more than the plaintiff in *Cole v. Fair Oaks Fire Protection Dist.* . . . The kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship. Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions.' (*Shoemaker v. Myers* [1990] 52 Cal.3d [1,] 25.) We reaffirmed this holding in *Livitsanos v. Superior Court*, which also involved a terminated employee: 'So long as the basic conditions of compensation are otherwise satisfied (Lab. Code, § 3600), and the employer's conduct neither contravenes fundamental public policy [citation] nor exceeds the risks inherent in the employment relationship (*Cole* [*v. Fair Oaks Fire Protection Dist.* (1987)] 43 Cal.3d 148), an employee's emotional distress injuries are subsumed under the exclusive remedy provisions of workers' compensation.' (*Livitsanos v. Superior Court* [1992] 2 Cal.4th [744,] 754.)"

In some exceptional circumstances a separate civil action may lie where the employee's injury results from employer conduct that is outside the normal risk of employment. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, *supra*, 24 Cal.4th at p. 812.) As a guiding principle, the court must consider only the acts themselves and not the motives behind the acts. The critical issue is whether the alleged acts themselves, bereft of claimed motives, "'can ever be viewed as a normal aspect of the employer relationship' . . . ." (*Id.* at p. 822.) Termination of employment, including reasonable attempts to investigate employee theft and interrogations, are considered to be a normal part of the employment relationship and hence do not give rise to a tort action against the

employer. (*Id.* at p. 821; *Cole v. Fair Oaks Fire Protection Dist., supra,* 43 Cal.3d at pp. 159-160.)

Our colleagues in the Second Appellate District have held that the tort of intentional infliction of emotional distress is not actionable in wrongful termination cases. This is because the conduct at issue must itself be outrageous—not the motivation behind the conduct. As explained in *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80: "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination." Other districts concur. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1379 (Sixth Dist.) ["infliction of emotional distress claims are merely alternative legal theories for holding defendants liable for the same conduct" that underlies a related intentional tort. Thus, such claims are "redundant" and must stand or fall with the related claim]; and see *Sheppard v. Freeman* (1998) 67 Cal.App.4th 339, 343 (Fourth Dist.) [actions for inducing the employer's breach are barred "whether or not the employees are determined to have been acting within the scope of their employment and regardless of their personal motives"].)

The claim fails because Cifuentes has not provided evidence raising a triable issue of material fact that the alleged wrongful conduct fell outside the scope of the normal employment relationship. (See, e.g., *Buscemi v. McDonnell Douglas Corp.* (9th Cir. 1984) 736 F.2d 1348, 1352 [plaintiff was allegedly fired on a pretext, without cause and in a "callous and insensitive manner"].)

NEGLIGENCE

The negligence claim, too, is barred by the exclusive remedy provisions of the workers' compensation law. (*Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261, 1266; see also *Elsner v. Uveges* (2004) 34 Cal.4th 915, 931 [issue of negligence does not arise in workers' compensation scheme].) In *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002, our Supreme Court explained: " To prevent employees from circumventing the exclusivity rule by bringing lawsuits for work-related injuries against coemployees, who in turn would seek indemnity from their employers, the Legislature in 1959 provided immunity to coemployees. [Citation.] In other words, the purpose of the exclusivity rule would be defeated if employees could bring actions against fellow employees acting in the scope of employment such that the fellow employees' negligence could be imputed to their employers. [Citation.] Therefore, workers' compensation was also made the exclusive remedy against fellow employees acting within the scope of employment. (*Ibid.*) . . . [¶] . . . [A] coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. [Citation.] 'It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages.'"

Moreover, where, as here, a plaintiff claims no injury until he is discharged, there is no tort remedy for negligence. "As long as the alleged injury would not have occurred but for the employment termination, *Foley* [*v. Interactive Data Corp.* (1988) 47 Cal.3d 654] indicates that the employee is generally limited to a contractual remedy." (*Hine v. Dittrich* (1991) 228 Cal.App.3d 59, 65.) There is no evidence that Cifuentes suffered injury prior to his termination. At his deposition, he stated that all his physical and financial problems occurred after his termination.

PUNITIVE DAMAGES

Because we conclude Cifuentes failed to establish a triable issue of material fact on any of his tort claims, we need not address his punitive damage claim. Cifuentes cannot recover any damages, compensatory or punitive, in the absence of a theory of recovery that supports the damage award.

The judgment is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.*

We concur:

KLEIN, P.J.

CROSKEY, J.

*Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

Edward Lowenschuss for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Tara Wilcox, Jeffrey A. Dinkin and Aaron W. Heisler for Defendants and Respondents.